Editor's note: 89 I.D. 415

RALPH F. ROSENBAUM ET AL.

IBLA 80-953, 81-117
81-118, 81-136 Decided August 30, 1982

Appeals from decisions of Montana State Office, Bureau of Land Management, authorizing noncompetitive sales of public lands. M 45059 (SD).

Set aside and remanded.

1. Accretion--Boundaries--Navigable Waters--Public Lands: Riparian Rights

Where riparian public land has been eroded away entirely by the actions of a navigable river and the river subsequently returns to its original banks, restoring the eroded land through accretion, title to the accreted land is deemed to be in the remote riparian owner to whose land the accretion attaches, rather than the United States.

Towl v. Kelly, 54 I.D. 455 (1934), overruled.

APPEARANCES: Everett A. Bogue, Esq., Vermillion, South Dakota, for appellant Ralph F. Rosenbaum; Wayne D. Groe, Esq., Elk Point, South Dakota, for appellants Sylvia E. Rosenbaum and Mary Jane Rosenbaum; Martin Weeks, Esq., Vermillion, South Dakota, for appellant Earl Hummel.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ralph F. Rosenbaum and others have appealed from decisions of the Montana State Office, Bureau of Land Management (BLM), dated August 15, 1980, authorizing the noncompetitive sale to appellants of public lands situated in secs. 32 and 33, T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota, pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1976), subject to payment of the appraised value of the land. 1/

Although the appeals address the question of the appraised value, they also raise a threshold question which has not heretofore received adequate consideration, i.e., whether the United States has title to the lands which it now seeks to sell to appellants. After a careful review of the record and consideration of the law in this area, we must conclude that the record does not support a finding that the United States has title to the lands.

On December 28, 1861, the Surveyor General approved a plat of survey of T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota. The 1861 survey indicated that lots 1, 2, and 3 in sec. 32 and lots 2 and 3 in sec. 33 were riparian, bordering on the Missouri River. These lands, together with the N 1/2 SW 1/4 of sec. 33 adjacent thereto, occupied approximately the same location as the lands identified in the BLM decisions under

1/ Appendix A is a list of the appellants, the lands offered for sale, the acreage involved and the appraised values.

appeal and the 1979 dependent resurvey approved March 5, 1981. See Appendix A. 2/ These lands were not patented.

By memorandum dated August 25, 1976, the District Manager, Miles City, Montana, BLM, requested a cadastral survey in part of the lands involved herein, in order "[t]o determine the extent of Federal ownership of lands along the Missouri River in Union County, South Dakota." By memorandum dated May 6, 1977, the Chief, Division of Technical Services, BLM, responded to the District Manager's request for a cadastral survey. In so doing, he outlined the history of the Missouri River's location in this area:

> The area requested for resurvey by the Miles City District Manager was originally surveyed in 1861. At this time, the land was riparian to and situated along the left bank of the Missouri River. Subsequent to this survey in 1861, the Missouri River began an erosive action against this left bank, moving in a east-northeasterly direction, until 1892 when the left bank terminated its movement at the position depicted on the Missouri River Commission Survey of 1895. This approximate position being along the N-S center line of the E 1/2 E 1/2 of sec. 33, approximately one mile East of its original position. A 1930 Missouri River Aerial Photographic Survey shows the Missouri River had reversed its movement beginning an accretive process of restoring land along this left bank. The position of the left bank as shown on the 1930 map is approximately one quarter of a mile west of its 1892 position.
>
> A 1946-47 Missouri River Map prepared by the Corps of Engineers indicates the left bank has continued its accretive process to a position nearly the same as the left bank as originally surveyed in 1861.

Id. at 1.

2/ It would appear from the 1861 survey and the dependent resurvey that the lands offered for sale to appellant Ralph F. Rosenbaum were situated in 1861 in the bed of the Missouri River. Title to these lands raises a distinct issue which will be dealt with subsequently in this decision.

In June and July 1959, various homestead and color-of-title applications were filed covering a substantial portion of the lands involved herein and additional land. In September 1959, Karl Esplin, a BLM land examiner, examined all of the lands involved herein. In a report dated December 16, 1959, he stated:

> A field investigation and study of aerial photos over a period of 20 years indicate that the River has washed away the east bank of the Missouri River until all of the public domain was lost. The east bank had gradually and imperceptibly moved back to the original 1861 survey in 1941. At the present time, the east bank is about 1/4th mile west of the original survey.
>
> It is quite evident that the land where the public domain was located is now accretion land. The entire vegetative growth is less than 30 years old. The 1941 photographs show new vegetative growth and several small river channels crossing the land.

By memorandum dated January 7, 1960, the office of the Cadastral Engineer, Billings, Montana, BLM, agreed with Esplin's analysis that "the subject public domain was completely washed away and reappeared as accretion to the remote tracts." Relying on that assessment, the State Supervisor, BLM, by memorandum dated January 8, 1960, told the Land Office Manager, BLM, to reject the homestead and color-of-title applications because "the lands are riparian with all riparian rights and the United States no longer has any claim to them." By decision dated January 18, 1960, the Chief, Land Adjudication, Billings, Montana, BLM, rejected the applications "because the United States has no claim or jurisdiction over the lands involved." The decision explained:

> Since the lands in question, as shown by the plat of 1861, were washed away by the Missouri River and the present

> lands were formed subsequently by accretion, the United States has no claim to the present lands. The present lands are subject to the riparian rights of the owners of the uplands to which they are riparian.

BLM, however, subsequently reversed its position with respect to the United States claim to the lands involved herein. By memorandum dated September 28, 1961, the State Director, Montana State Office, BLM, was informed by the Acting Chief, Division of Appeals, BLM, that title to the restored land is in the United States under the principle enunciated in Towl v. Kelly, 54 I.D. 455 (1934):

> Where surveyed public lands of the United States bordering upon a navigable stream, and to which the United States has not parted with title, are eroded in their entirety by the action of the stream, and later restored by accretion, title to the lands so restored is in the United States, and not in the owners of the remote nonriparian lands, which for a time were the shore lands.

In a letter to Wayne D. Groe, Esq., attorney for appellants Sylvia E. Rosenbaum and Mary Jane Rosenbaum, the District Manager, Miles City, Montana, BLM, specifically stated: "The Bureau of Land Management does not hold to the decision of January 18, 1960. Our present position is that title to lands eroded away in their entirety and later restored by accretion, is restored to the original riparian owners." The District Manager cited Towl v. Kelly, supra.

A subsequent color-of-title application (M 41224(SD)) filed by appellant Earl Hummel was rejected by BLM decision of January 23, 1979, on the ground that appellant had not been in good faith adverse possession of the land for

the requisite statutory period of 20 years. This finding was based on appellant's having filed a homestead application in 1959, thus acknowledging title in the United States, only 4 years after the date of a deed from a private party purporting to convey the land to appellant. This earlier decision was appealed to the Board, which affirmed the BLM decision. Earl Hummel, 44 IBLA 110 (1979). However, in a concurring opinion, Administrative Judge Stuebing noted the changed BLM position on the question of title to the accreted land and his doubt as to whether proper application of the law of accretion supported that position.

[1] There is little doubt based on the record that the lands involved herein were eroded away in their entirety by the actions of the Missouri River and that new land was formed in the same general location through the process of accretion, i.e., the gradual and imperceptible addition to adjacent riparian land by the deposit of alluvial soil. The question of title hinges on the legal interpretation which is given to this factual context.

The generally accepted rule governing accretions holds that title to the accreted land belongs to the riparian owner. California ex rel. State Lands Commission v. United States, 50 U.S.L.W. 4672 (U.S. June 18, 1982); Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890); David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978). The Supreme Court in Jefferis v. East Omaha Land Co., supra, at 189, 191, found that the rule is supported on two grounds: (1) that such owners should be entitled to accretions because they must bear without compensation the losses of encroachment by the water, and (2) that as a matter of public policy all lands ought to have an owner, and

it is most convenient that insensible additions to the shore should follow title to the shore.

Courts, however, are divided on the question of title where land in a riparian lot has eroded away to such an extent that a formerly remote lot becomes riparian and then by the process of accretion the land is restored, i.e., as to whether title to the restored land is in the remote riparian owner or the original riparian owner. 78 Am. Jur. 2d Waters § 421 (1975). The question of title to the unpatented tract of land is governed by Federal common law. California ex rel. State Lands Commission v. United States, supra; Wilcox v. Jackson, 38 U.S. (13 Pet.) 266, 276 (1839); David A. Provinse, supra, at 227-30, 85 I.D. at 157-58; cf. Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (state law held applicable where land at issue in riparian rights case had long been in private ownership). The Department, in Towl v. Kelly, supra, adopted the view that title is in the original riparian owner. Because we believe that the better rule is that title is in the remote riparian owner, we adopt that rule and, accordingly, expressly overrule Towl v. Kelly, supra.

We believe that there is substantial support for this view not only in the view of "many of the courts which have considered the matter," 4 Tiffany, Real Property § 1224 (3d ed. 1975), but in legal interpretations of closely analogous situations.

In cases where land accretes to a riparian lot to such an extent that it reaches across a former riverbed and restores land on the opposite shore

which had eroded away, title to the accretion is deemed to be in the riparian owner to whose land the accretion attaches and not in the original owner of the eroded land. Matthews v. McGee, 358 F.2d 516 (8th Cir. 1966); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966); Edwin J. Keyser, 61 I.D. 327 (1954), and cases cited therein.

Similarly, where land accretes to a riparian lot to such an extent that it reaches across a former riverbed and restores an island which has eroded away, title to the accretion is deemed to be in the riparian owner to whose land the accretion attaches and not in the original owner of the eroded island. United States v. 2,134.46 Acres of Land, 257 F. Supp. 723 (D.N.D. 1966), aff'd sub nom. Peterson v. United States, 384 F.2d 664 (8th Cir. 1967). In J. M. Jones Lumber Co., 74 I.D. 417 (1967), the Department applied the rule of accretion enunciated in Keyser in the case of an island, formerly in United States ownership, which had eroded away and then reappeared through accretion to riparian land:

> The only complicating, and to some extent confusing variation, is that the physical site of the reappearing land was once an island instead of the opposite bank. But there does not seem to be any reason why accretion invading the site of a former island should be governed by a rule different from that applicable to the opposite bank of a river.

Id. at 423. The Department held that title to the accretion is in the riparian owner, rather than the original owner of the eroded island.

We believe that the rule of accretion as set forth in cases where an accretion restores land, whether the opposite bank of a river or an island,

which has eroded away, is equally applicable in cases where land, once eroded away, has reappeared, on the same side of the river, through accretion. In all such cases, the original owner of the eroded land loses title to the land when it erodes away entirely and does not regain it when the new land reappears through accretion. Rather, the riparian owner to whose land the accretion attaches takes title. 3/

We believe that such a rule takes into account not only the practical but the equitable considerations in this matter. Once land has eroded away and becomes part of the bed of a navigable river, the original owner is divested of title to the land and the state generally takes title. Furthermore, once new land has been created by accretion the new riparian owner acquires all of the riparian rights. As Administrative Judge Stuebing said in his concurring opinion in Earl Hummel, supra, at 119: "The right to accretion is just one of the bundle of riparian rights." As the new riparian owner bears the risk of loss of his property by further erosion, he should not be denied the benefit of any accretion. In addition, the new riparian owner has acquired a right of access to water "which is often the most valuable feature" of such property. Hughes v. Washington, 389 U.S. 290, 293 (1967).

3/ Were this a case where the eroded land had reappeared through an accretion to the opposite bank, rather than to its own side of the river, we would have held, in line with J. M. Jones Lumber Co., supra, that title was clearly in the riparian owner, rather than the original owner of the eroded land. See Margaret C. More, 5 IBLA 252 (1972), aff'd sub nom. United States v. More, Civ. No. T-5331 (D. Kan. Jan. 17, 1980) (citing with approval Judge Stuebing's concurring opinion on the law of accretion in Earl Hummel, supra). We, therefore, view Towl as inconsistent with that line of cases. It is an aberration from the general rule of accretion.

It is said in Towl v. Kelly, supra, at 461, that the equities are with the original riparian owner whose land has eroded away, rather than the remote riparian owner who acquired riparian rights through a "fortuitous event." The fact of the matter is that the remote riparian owner has acquired those rights. Should he be deprived of those rights through an equally fortuitous event, i.e., a return by the river to its original banks?

Similarly, it is said in Towl v. Kelly, supra, at 461, that one of the reasons for permitting a riparian owner to take accretions was "because the watercourse was by intent one of his boundaries." Presumably, this does not apply to an originally landlocked remote riparian owner. It should be noted, though, that the shift in a river's course may result in a change in legal position, especially where the river stabilizes in its new location for any period of time. The new riparian owner may himself, by conveying the riparian lot, establish the river as a boundary of his lot "by intent." Our holding is only applicable in cases of erosion and accretion, a process which usually takes a long period of time. In that time period, the remote riparian owner establishes his riparian rights. When the river shifts back to its original course, the original riparian owner may well have died or he and/or his heirs may be unlocatable. In such circumstances, there would be no original owner or even successors in interest to whom to award title to the land. In view of this, we find that the equities have shifted to the remote riparian owner with the change in the course of a river through erosion and accretion.

The only Federal case which the Department cites in Towl v. Kelly, supra, in support of its holding therein is Stockley v. Cissna, 119 F. 812

(6th Cir. 1902). In that case, the court held that an original riparian owner regains title to land, which was "washed off," where "by reliction or accretion the water disappears and the land emerges." Id. at 831. The principle is more accurately described as "re-emergence" which rests upon the easy identification of riparian land lost and then found again by re-emergence from the stream. Beaver v. United States, supra, at 11.

That doctrine holds that, where riparian land has been submerged and then subsequently re-emerges through a subsidence of the water such that the same land is exposed, title is in the original riparian owner, rather than the remote riparian owner. Arkansas v. Tennessee, 246 U.S. 158 (1918). The doctrine is an exception to the rule of accretion. It rests on the easy identification of the land which has re-emerged. In any event, the doctrine of "re-emergence" is not applicable where land has eroded away and then been restored through the process of accretion. Arkansas v. Tennessee, supra, at 174-75. Cases applying that doctrine are properly distinguished from this case. 4/

The record, therefore, fails to indicate that title to the land which BLM offers to sell to appellants is in the United States. If title is not

4/ We also note that the Department in Towl recognized that the case therein could equally be decided on the basis of the rule of avulsion, enunciated in St. Louis v. Rutz, 138 U.S. 226 (1891), i.e., sudden and perceptible changes in the course of a river do not deprive riparian owners of their land. See Towl v. Kelly, supra, at 461-62. This is also distinguishable from the law of accretion.

in the United States, then sale of the land to appellants for the appraised fair market value is not proper. 5/

We turn next to the question of title with respect to the land which BLM seeks to sell to appellant Ralph F. Rosenbaum. The land is situated in sec. 32, T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota. Counsel for appellant asserts that the land which he is claiming is part of Cottonwood Island which formed in the river south and west of lots 1, 2, and 3 in the 1861 survey and which is not an accretion to the upland. Counsel notes that title to the island was the subject of litigation in State court which resulted in a judgment in 1949 that the State of South Dakota was the owner of the island.

Appellant contends that he is the record title owner of the 12.25 acres of land by virtue of a patent, No. 19936, from the State of South Dakota, dated January 11, 1963, and that the United States does not have title to the land. Appellant argues that at the time of the admission of South Dakota to the Union in 1864, the land was in the bed of the Missouri River.

The 1861 survey indicates that lot 1, comprised of 21.70 acres, was situated in the southeastern corner of sec. 32. The lot was bounded on the

5/ We note the presence in the files of letters dated Sept. 12, 1980, and Sept. 19, 1980, to appellants Mary Jane Rosenbaum, Sylvia Rosenbaum, and Earl Hummel indicating the intent of BLM to bill appellants for use of the land in growing crops. These letters were obviously written pursuant to the decisions to sell the land, subject to payment of the appraised value, which decisions are the subject of these appeals. Pursuant to regulation, a decision is not effective during the time in which a person adversely affected may file a timely notice of appeal and pending resolution of any appeal timely filed. 43 CFR 4.21(a). Since appeals were timely filed by these applicants from the decision to sell the land, the collection of rent in the interim is likewise suspended. Our decision herein negates the obligation to pay rental.

south and west by the Missouri River. Thereafter, lot 1 was eroded away by the eastward shift of the Missouri River. It reappeared when the river returned to its approximate original location.

By memorandum dated May 6, 1977, the Chief, Division of Technical Services, BLM, in responding to a request by the District Manager, Miles City, Montana, BLM, for a cadastral survey in part of sec. 32, T. 90 N., R. 49 W., fifth principal meridian, South Dakota, stated that the "limit of the Federal government's claim to the land" is what is "believed to be an abandoned channel of the river."

On July 5, 1978, appellant filed a color-of-title application, M 41127 (SD), pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (1976), in part for land described as an accretion to lot 1, sec. 32, T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota. By decision dated January 23, 1979, BLM rejected the application because the land was not claimed by the United States. BLM reiterated that the United States only claimed land on the mainland side of the abandoned channel of the river and "not lands that arose from the bed of the river that are cut off from the mainland by a channel of the river." Id. at 3.

Also, by letter dated January 23, 1979, BLM informed appellant's attorney that it was working on a "proposal" to sell appellant certain land sought in his color-of-title application (presumably on the theory that the tract had accreted to the upland) pursuant to section 203 of FLPMA, 43 U.S.C. § 1713 (1976), giving him a "preference right." Pending a resurvey, the acreage was identified as 12.25 acres of land south and west of lot 1, as originally designated in the 1861 survey.

By letter dated April 3, 1980, BLM had informed appellant's attorney that appellant had been identified as a preference right claimant as to the 12.25 acres and that he "may elect to receive an offer to purchase the land * * * by completing and returning" an enclosed form. On May 13, 1980, BLM received a "Notice of Intention to Exercise Right to Receive Offer of Direct Sale" signed by appellant. The "Notice" identified the land sought by appellant as "12.25 acres in Lot 6 of the resurvey of Section 32 which is southwest of the location of original Lot 1." 6/ In its August 1980 decision, BLM authorized the sale to appellant of the 12.25 acres of land.

It is a well settled principle of law that upon the admission of a state to the Union, the ownership of the bed of a navigable river passes from the United States to that state. Scott v. Lattig, 227 U.S. 229 (1913). It is apparent in the present case that the 12.25 acres of land sought by appellant was, at the time of the 1861 survey, in the bed of the Missouri River. The land was south and west of the line of the river, as originally designated in that survey. The record is not altogether clear, however, as to whether the 12.25 acres of land subsequently emerged through the process of accretion to the upland or emergence of an island in the riverbed. In accordance with our prior analysis, it is clear that regardless of whether lot 7 is an island which emerged from the riverbed or an accretion to the upland, title to the land which BLM offered to sell to appellant would not be in the United States.

Accordingly, the decisions appealed from offering to sell the land for fair market value must be set aside.

6/ The tract sought by Ralph Rosenbaum was described as Lot 7 in the plat of resurvey as finally approved. See Appendix A.

BLM has expressed a willingness throughout the record to recognize the equities of those using and occupying the lands involved herein and to convey title to them. In view of such willingness and the lack of evidence of title in the United States, BLM may wish to explore issuance of recordable disclaimers of interest to appellants, pursuant to section 315 of FLPMA, 43 U.S.C. § 1745 (1976). That section authorizes issuance of such instruments "where the disclaimer will help remove a cloud on the title of such lands and where [the Secretary] * * * determines * * * (3) accreted, relicted, or evulsed lands are not lands of the United States." 43 U.S.C. § 1745(a) (1976). The disclaimer of interest is in effect a quitclaim deed from the United States. 43 U.S.C. § 1745(c) (1976). Adjudication by BLM of any application for recordable disclaimer of interest which is filed should await promulgation of the regulations implementing this statutory term, or provision of implementing authority by policy directive. City of San Antonio, Texas, 65 IBLA 326 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are remanded to BLM.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge

APPENDIX A

IBLA Nos.	Names of Appellants	Lands Offered for Sale *	Appraised Acreage *	Value
80-953	Ralph F. Rosenbaum	Western portion of lot 6, sec. 32	12.25	$9,500
81-117	Sylvia E. Rosenbaum	Eastern portion of lot 6, sec. 32	20.04	18,000
81-118	Mary Jane Rosenbaum	NE 1/4 SW 1/4, lots 4, and 5, sec. 33	94.89	98,600
81-136	Earl Hummel	NW 1/4 SW 1/4, lot 4, sec. 33	57.91	49,900

* The lands offered for sale were described with reference to the unapproved plat of the dependent resurvey executed in 1979 by Cadastral Survey, BLM. The plat as approved by the Chief, Cadastral Survey, BLM, on Mar. 5, 1981, after the appeals were filed from the decisions of BLM in these cases, identified the tract of land offered for sale to appellant Ralph F. Rosenbaum as lot 7 containing 13.91 acres instead of 12.25 acres. The approved plat of resurvey identified the tract offered for sale to Sylvia E. Rosenbaum as lot 8 with the same acreage as described in the BLM decision. The conflict in the lands offered for sale to Mary Jane Rosenbaum and Earl Hummel involving lot 4, sec. 33, was left by decision of BLM to be resolved by agreement between the two parties.